

CANADA / JUDGMENT

Oswald v. Start Up SRL

2020 BCSC 205

COURT

Supreme Court of British Columbia

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2020 BCSC 205 Oswald v. Start Up SRL IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Oswald v. Start Up SRL, 2020 BCSC 205 Date: 20200218 Docket: S166959 Registry:

Vancouver Between: Nevil Oswald Plaintiff And: Start Up SRL Defendant And: Nevil Oswald

Narendra Mhamunkar Start Up SRL Defendants by Counterclaim Before: The Honourable Justice

Giaschi Ruling on Voir Dire Counsel for the Plaintiff and Defendant by Counterclaim, Nevil

Oswald: J. K. McEwan, Q.C. E. Aitken Counsel for the Defendant, Start Up SRL: T. Tomchak Y. Li-

Reilly M.P.T. Miller Counsel for the Defendant by Counterclaim, Narendra Mhamunkar: A.

Morrison Place and Date of Hearing: Vancouver, B.C. June 17, 18 and October 25, 2019 Place and

Date of Judgment: Vancouver, B.C. February 18, 2020 Table of Contents Introduction. 3 The

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Introduction

- [1] The main claim in this matter seeks specific performance of a Memorandum of Understanding dated July 11, 2015 ("MOU") between the plaintiff and defendant by counterclaim, Mr. Oswald, and Start Up SRL ("Start Up"), which allegedly requires Start Up to purchase the shares of Mr. Oswald and the defendant by counterclaim, Mr. Mhamunkar, in ICTC Holdings for an agreed price of \$3.1 million. A main defence to the claim is that Mr. Oswald and Mr. Mhamunkar fraudulently or negligently misrepresented the financial performance of Hero India, an indirect subsidiary of ICTC Holdings. Start Up pleads these misrepresentations inflated the value of the shares and that the MOU is therefore void. In its counterclaim, Start Up pleads that it purchased shares of ICTC Holdings in 2015 from

companies or trusts controlled by Mr. Balmer and Mr. Traub at an agreed price of 6.5 times earnings before interest, taxes, depreciation and amortization ("EBITDA"). Start Up further pleads that, because of the misrepresentations, the EBITDA of ICTC Holdings was overstated and it consequently paid too high a price for those shares. Start Up seeks damages in the counterclaim for the difference between what it actually paid Mr. Balmer and Mr. Traub and what it should have paid. The admissibility of the evidence tendered, in part to calculate those damages, is the issue in this voir dire. The Disputed Evidence

- [2] The only witness on the voir dire was Mr. Gabriele Rinero, the Chief Financial Officer ("CFO") of the Hero Group and a Director of Hero India. The disputed evidence is primarily in relation to document 248, from the Common Book of Documents, which is a multi-tab, 355 page document. Tab 1 of document 248, entitled "Start Up Share Value Calculations", was prepared by Mr. Rinero. Tabs 2 through 18 are various source documents and calculations used to prepare the valuations and calculations in tab 1.
- [3] Tab 1 of document 248 contains several calculations prepared by Mr. Rinero. Using the original December 31, 2014 financial statements, he calculated the EBITDA of Hero India, the Group EBITDA and the total and net value of the Group. He also calculated the value of the various share holdings by multiplying the percentage share holding by the net group value. Mr. Rinero then made several adjustments to the December 31, 2014 financial statement of Hero India and recalculated the various values. The calculations are as indicated in the table below:
- | Original Valuations | Revised Valuations |
|-----------------------------------|--------------------|
| Hero India EBITDA | |
| \$1,769,920 | (\$3,002,847) |
| Total Value of Group | \$55,574,578 |
| | \$24,551,594 |
| Net Value of Group | |
| \$34,250,881 | \$3,227,897 |
| Value of Traub shares (27.25%) | \$9,333,365 |
| | \$879,602 |
| Value of Balmer shares (14.07%) | \$4,819,099 |
| | \$454,165 |
| Value of Oswald Shares (8.44%) | \$2,890,774 |
| | \$272,434 |
| Value of Mhamunkar Shares (0.44%) | \$150,704 |
| | \$14,203 |
- [4] The adjustments made by Mr. Rinero to the December 31, 2014 financial statement of Hero India were to take into account various matters that Start Up submits should have been included in the December 31, 2014 financial statement but were not. The specific items and their amounts were:
- a) Loss of fixed assets (at 31/03/2016) (\$28,033);
 - b) Loss on inventory (at 31/03/2016) (\$69,039);
 - c) Loss on inventory (at 31/12/2016) (\$210,441);
 - d) Loss on account receivables (at 31/03/2016) (\$206,570);
 - e) Loss on account receivables (at 31/12/2016) (\$128,800);
 - f) Loss on advances to employees (at 31/03/2016) (\$61,733);
 - g) Loss on wrong assigned costs (at 31/03/2016) (\$91,612);
 - h) Service tax (related to years 2008 - 2010) (\$13,068);

- i) Service tax (related to years 2012 - 2015) (\$71,544);
 - j) Sales tax (related to years Apr 2015 - Aug 2015) (\$164,134);
 - k) Sales tax (related to years 2011 - 2012) (\$255,119);
 - l) Sales tax (related to years 2014 - 2015) (\$444,860;
 - m) Sales tax (related to years 2015 - 2016) (\$273,003);
 - n) Income tax (related to years 2006 - 2014) (\$119,137);
 - o) Income tax (related to years 2014 - 2015) (\$342); and
 - p) Provident Fund (related to years 2012 - 2016) (\$789,460).
- [5] Mr. Rinero's viva voce testimony related to his involvement with the Hero Group and Hero India and to the steps involved in preparing document 248. He testified that he became the CFO of the Hero Group on September 1, 2015 and a Director of Hero India in March 2016. As CFO it is his responsibility to prepare the consolidated financial statements of the Hero Group which he does by obtaining information from the various subsidiaries, including Hero India. He testified that he receives monthly balance sheets from the subsidiaries. He further testified that he has access to the SAP system of Hero India, a modular system used for business management.
- [6] Mr. Rinero is based in Italy, not India. He has traveled to India on three occasions, his first trip being in December 2015. In total, he has spent about five weeks in India. He acknowledged that he has no knowledge or expertise in Indian laws, customs or business practices and his only knowledge of Indian accounting practices is based on what he has been told by the company auditor in India. He has no personal involvement in the day-to-day accounting of Hero India and does not enter transactions or journal entries in its accounting system. However, starting in 2016, he began to become involved with the financial reporting of Hero India. He testified that he commenced preparing the financial statements using documents provided by the local management team. He also hired a local consultant to assist him.
- [7] It is clear from the evidence that following the departure of Mr. Oswald, an investigation was commenced by Start Up into some of the matters that are alleged in the counterclaim and included in document 248. It is further clear that Mr. Rinero had a key role in the investigation. Although the time frame of the investigation is not entirely clear, it appears to have commenced in or about October of 2015 and continued well into 2016. Further, in July 2016, the results of the investigation were made the subject of a police complaint against Mr. Oswald and Mr. Mhamunkar. The investigation was referred to by both Mr. Sacchet and Mr. Rinero and is also referenced in a letter dated October 2016 sent to customers of Hero India (doc. 210). That letter refers to "a deep investigation" involving local auditors, consultants and lawyers. According to Mr. Sachet, Rinero's involvement in the investigation was getting information from people in India.

- [8] Mr. Rinero admitted that the reason for preparing document 248 was for use in this litigation to prove the value of the shares. He admitted that it was not something he would prepare in the ordinary course of business. Positions of the Parties
- [9] Mr. Oswald and Mr. Mhamunkar object to the viva voce testimony of Mr. Rinero as to the share valuation and to the admission of most of document 248 and various other documents set out in Schedule "A" to Mr. Oswald's written argument. They submit that his testimony in relation to the value of the shares and tab 1 of document 248 is inadmissible opinion evidence. They further submit that the documents upon which his opinion is based, and the documents set out in Schedule "A" to Mr. Oswald's written argument, are inadmissible on the basis that their authenticity has not been established or the documents are hearsay and do not fall within a recognized exception or they contain opinion evidence.
- [10] Start Up submits that the source documents used by Mr. Rinero are admissible either as business records or under the principled exception to the hearsay rule. Start Up further submits that the evidence of Mr. Rinero of share values is admissible as a compendious statement of facts and that his spreadsheet is merely a demonstrative aid or a summary of evidence that is otherwise admissible.
- [11] I intend to address first the admissibility of the documents at tabs 2 through 18 of document 248 and the documents referenced in Schedule "A" to Mr. Oswald's written submissions. I will then address whether the share valuation at tab 1 and the viva voce evidence of Mr. Rinero as to the share valuation is inadmissible opinion evidence. Admissibility of Source Documents

Applicable Principles

- [12] The admissibility of the source documents raises issues of authentication and whether the documents are to be excluded pursuant to the hearsay rule. Authentication
- [13] The need to authenticate documents was addressed in *Slough Estates Canada Ltd. v. Federal Pioneer Ltd.*, [1994] O.R. (3d) 429 (O.C.). 57 It is a fundamental prerequisite to the admissibility of any document that the document be authenticated by the party tendering it in evidence. A document does not become evidence merely upon production; some testimony or other evidence must be adduced to authenticate it: *Scougall v. Stapleton* (1986), 12 O.R. 206 at pp. 209-10 (C.A.); *Ewart*, *Documentary Evidence in Canada* (1984) at p. 33; *Sopinka, Lederman and Bryant*, *The Law of Evidence in Canada* (1992) at pp. 46, 950-52; *Schiff*, *Evidence in the Litigation Process*, 4th ed. (1993), vol. 2 at pp. 1068-71. 58 A document may be authenticated by admissible evidence sufficient to establish that the document is genuine, such as identification of the document by its author or someone who observed the author create or sign the document. A mere purported signature or statement of authorship on the document's face is insufficient, as both are inadmissible hearsay: *Thompson v. Thompson* (1902), 4 O.L.R. 442 at pp. 446-47 (C.A.); *Russell v. Fraser* (1865), 15 U.C.C.P. 375 (C.A.); *Schiff*, *Evidence in the Litigation Process*, supra, at pp. 1070-71. 59 There is a reason

for this. Documents are disclosed by litigants because they are in their possession and appear on their face to be relevant. However, without some independent evidence of their authenticity -- they may have been surreptitiously put into files or been improperly filed -- the fact that they are shown in an affidavit on production by the opposite party does not make them admissible as evidence.

- [14] The Court of Appeal in *British Columbia (Securities Commission) v. Alexander*, 2013 BCCA 111, noted that authentication requires proof the document is what it purports to be. This is normally done by testimony from the maker of the document but threshold authenticity can also be established by circumstantial evidence.
- [65] Under the rules of evidence, documents (real evidence) must be authenticated, that is the documents must be proved to be what they purport to be before they may be admitted into evidence. To establish threshold authenticity, the author or creator of a document is typically called as a witness to attest that he or she made the document and what the document was intended to be. Threshold authenticity, however, may also be established by circumstantial evidence: David Watt, *Watt's Manual of Criminal Evidence* (Toronto: Thomson Reuters, 2012) at 96.
- [15] The Ontario Court of Appeal in *R. v. C.B.*, 2019 ONCA 380, also recently stated that authentication requires some evidence the documents sought to be admitted are what they purport to be but the Court noted that the threshold is a low one:
- [65] Authentication is the process of convincing a court that a thing matches the claim made about it. In other words, it is what its proponent claims it to be. Authentication is intertwined with relevance: in the absence of authentication, the thing lacks relevance unless it is tendered as bogus. Thus, authentication becomes necessary where the item is tendered as real or documentary evidence.
- [66] At common law, authentication requires the introduction of some evidence that the item is what it purports to be: *R. v. Donald* (1958), 1958 CanLII 470 (NB CA), 121 C.C.C. 304 (N.B. C.A., at p. 306; *R. v. Staniforth* (1979), 11 C.R. (3d) 84 (Ont. C.A.), at p. 89; *R. v. Hirsch*, 2017 SKCA 14, 353 C.C.C. (3d) 230, at para. 18. The requirement is not onerous and may be established by either or both direct and circumstantial evidence. See also: *R. v. Wilder*, 2002 BCSC 1333 at para. 288; *Animal Welfare International Inc. v. W3 International Media Ltd.*, 2013 BCSC 2193 at para. 61. Business Records
- [16] The business records exception to the hearsay rule is a common law rule and is also set out in s. 42 of the Evidence Act, R.S.B.C. 1996, c. 124. The Evidence Act provision: 42 (1) In this section: "business" includes every kind of business, profession, occupation, calling, operation or activity, whether carried on for profit or otherwise; "document" includes any device by means of which information is recorded or stored; "statement" includes any representation of fact, whether made in words or otherwise.

- (2) In proceedings in which direct oral evidence of a fact would be admissible, a statement of a fact in a document is admissible as evidence of the fact if
 - (a) the document was made or kept in the usual and ordinary course of business, and
 - (b) it was in the usual and ordinary course of the business to record in that document a statement of the fact at the time it occurred or within a reasonable time after that.
 - (3) Subject to subsection (4), the circumstances of the making of the statement, including lack of personal knowledge by the person who made the statement, may be shown to affect the statement's weight but not its admissibility.
 - (4) Nothing in this section makes admissible as evidence a statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to a fact that the statement might tend to establish.
 - (5) For the purpose of any rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible by this section must not be treated as corroboration of evidence given by the maker of the statement.
- [17] For a document to be admitted into evidence under the business records exception of the Evidence Act, the party tendering the document must prove all of the elements in s. 42, namely, that the document was:
- a) made contemporaneously;
 - b) by someone having a personal knowledge of the matters being recorded;
 - c) by someone who has a duty himself or herself to record the notes or to communicate the notes to someone else to record as part of the usual and ordinary course of their business; and
 - d) that the matters which are being recorded must be of the kind that would ordinarily be recorded in the usual and ordinary course of that business. *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2018 BCSC 859, at para. 16.
- [18] Importantly:
- a) Pursuant to s. 42(3), lack of personal knowledge by the maker of the statement does not affect the document's admissibility but may affect the weight to be given to the document; and
 - b) Pursuant to s. 42(4), a statement made by an interested person when proceedings were pending or anticipated is not admissible.

- [19] The common law exception for business records is similar to the Evidence Act exception, but not identical. The elements to be proven under the common law exception are set out in *The Owners et al v. Homer Street et al v. O'Neill Hotels et al*, 2007 BCSC 1265, at para. 18:
- [18] Alternatively to s. 42 of the Evidence Act, plaintiffs' counsel submits that the common law exception to the hearsay rule, as explained in *Ares v. Venner*, 1970 CanLII 5 (SCC), [1970] S.C.R. 608, applies and the memoranda should be admitted as prima facie proof of what statements and determinations were made at the meetings, under that common law exception. The elements of the exception appear to be:
- a) the record must contain an original entry;
 - b) the maker of the record must have been under a duty to record the particular act;
 - c) the record must have been prepared in the regular course of the business;
 - d) the record must be made contemporaneously or within a reasonable time after the occurrence of the acts to which it relates; and
 - e) the maker of the record must have personal knowledge of the matters being recorded.
- [20] An apparent distinction between the common law exception to the hearsay rule for business records and s. 42 of the Evidence Act, concerns the personal knowledge of the maker of the record. The common law exception appears to strictly require that the maker have personal knowledge whereas under the Evidence Act, pursuant to s. 42(3), such lack of knowledge merely goes to weight. However, even under the common law exception lack of personal knowledge is not fatal to the admission of the record. In *Animal Welfare International Inc. v. W3 International Media Ltd.*, 2013 BCSC 2193, business records were admitted where the maker of the record did not have personal knowledge.
- [30] Double hearsay is likewise not a barrier to admissibility at common law. The court in *Monkhouse*, at 104, held that clerks preparing records based on information supplied to them by others need not have personal knowledge of that information, finding it "sufficient if the recorder is functioning in the usual and ordinary course of a system in effect for the preparation of business records."
- [21] Although the elements of the business records exception are often proved by the maker of a record, this is not always necessary. In *Mohamed v. Intransit BC Limited Partnership*, 2015 BCSC 1300, control room log entries were admitted as business records notwithstanding that the author of the entries was not identified and did not give testimony. (see also: *Lederman et.al.*, *The Law of Evidence in Canada*, (5th ed.), at para. 6.209).
- [22] Examples of the categories of documents that are admitted under the business records exception are set out in para. 41 of *Setak Computer Services Corp. v. Burroughs Business Machines Ltd.*, (1977) 76 DLR (3d) 741, as including: "ledger accounts, time-cards, pay-roll records, and other routine commercial records". Other examples include: ledger cards recording amounts received from debtors: *Iaci v. DiSalvo*, 2012 BCCA 474; ledgers describing

order and payment information: *Fill-More Seeds Inc. v. Victoria Seeds Inc.*, 2009 BCSC 1732; and bank deposit slips: *Samra v. Guru Nanak Gurdwara Society*, 2008 BCCA 202. The Principled Approach

- [23] The principled approach to the admission of hearsay evidence was addressed by the Supreme Court of Canada in *R. v. Mapara*, 2005 SCC 23, [2005] 1 S.C.R. 358, and requires a consideration of whether the proffered evidence is reliable and necessary: 15 The principled approach to the admission of hearsay evidence which has emerged in this Court over the past two decades attempts to introduce a measure of flexibility into the hearsay rule to avoid these negative outcomes. Based on the Starr decision, the following framework emerges for considering the admissibility of hearsay evidence:
- (a) Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place.
 - (b) A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance.
 - (c) In "rare cases", evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.
 - (d) If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a voir dire. (See generally D. M. Paciocco and L. Stuesser, *The Law of Evidence* (3rd ed. 2002), at pp. 95-96.) 16 Admissibility of evidence is determined on the basis of "threshold reliability" provided by circumstantial indicators of reliability. The issue of "ultimate reliability" is for the trier of fact, in this case the jury.
- [24] In *R v. Lemay*, 2004 BCCA 604, at paras. 45 and 46, it was held that the principled approach to hearsay applies to documents.
- [45] The principled approach to the admission of hearsay evidence is now well established through a line of cases decided by the Supreme Court of Canada: *R. v. Khan*, 1990 CanLII 77 (SCC), [1990] 2 S.C.R. 531; *R. v. Smith*, 1992 CanLII 79 (SCC), [1992] 2 S.C.R. 915; *R. v. B.(K.G.)*, 1993 CanLII 116 (SCC), [1993] 1 S.C.R. 740; *R. v. Hawkins*, 1996 CanLII 154 (SCC), [1996] 3 S.C.R. 1043; and *R. v. Starr*, 2000 SCC 40 (CanLII), [2000] 2 S.C.R. 144. In those cases, the court developed an approach that recognizes hearsay as being substantively admissible for the truth of its content when it is both necessary and sufficiently reliable as those considerations may be assessed in the circumstances of any given case.
- [46] While in each instance the court was concerned with the admissibility of out-of-court oral statements, the principled approach has now been adopted by at least two appellate courts to the admissibility of documents for the truth of their contents: *R. v. Larsen* (2003), 10 B.C.L.R. (4th) 112, 2003 BCCA 18, where the admission of reports of a deceased pathologist in a case against a person being tried for murder was upheld; and *R. v. Wilcox* (2001), 152

C.C.C. (3d) 157, 2001 NSCA 45 (N.S.C.A.), where an employee's record of fish buying transactions was held to be admissible evidence in a prosecution of his employer for illegal fishing. The approach has also been adopted by several trial courts as cited in Wilcox at para. 60.

- [25] Additionally, it is worth noting that the principled approach can apply to negate the admissibility of a hearsay statement under the traditional exceptions to the hearsay rule. This was determined by the Supreme Court of Canada in *R. v Starr*, 2000 SCC 40, at para. 106: 106 In the result, I conclude that the Court of Appeal erred in admitting the statement in question under the "present intentions" exception to the hearsay rule. However, Khan, supra, and subsequent cases have established that hearsay that does not fit within a traditional exception may nonetheless be admissible if it meets the twin criteria of reliability and necessity. This case therefore requires that we determine the admissibility of evidence under the principled approach, and more particularly, the interaction between the principled approach and the traditional exceptions. In so doing, I conclude that hearsay that does fit within a traditional hearsay exception, as currently understood, may still be inadmissible if it is not sufficiently reliable and necessary. The traditional exception must therefore yield to comply with the principled approach.
- [26] Also noteworthy is the case of *Kon Construction Ltd. v. Terranova Developments Ltd.*, 2015 ABCA 249 [Kon Construction], where the Alberta Court of Appeal noted that summaries of voluminous source documents are admissible:
- [46] The rules of evidence permit the introduction of summaries of voluminous source documents, where it would be impractical and wasteful to expect the court or the jury to go through all of the source documents and extract the necessary inferences: *J.H. Ashdown Hardware Co. v Singer*, 1951 CanLII 268 (AB CA), [1952] 1 DLR 33, 3 WWR (NS) 145 at pp. 148-9 affm'd 1953 CanLII 66 (SCC), [1953] 1 SCR 252, [1953] 2 DLR 625; *R. v Scheel* (1978), 1978 CanLII 2414 (ON CA), 42 CCC (2d) 31 at p. 34 (ONCA). It is generally a requirement that the source documents be disclosed to the opposing side, and introduced as part of the trial record [Emphasis added] Application of the Above Principles to the Source Documents Authentication
- [27] Unless otherwise indicted herein, I find that Mr. Rinero, by virtue of his position as the CFO of the Hero Group and a Director of Hero India, is able to authenticate the documents that emanate from Hero India or were addressed to Hero India. This includes the financial statements of Hero India, documents generated by the SAP system of Hero India, journal entries made by the accounting staff of Hero, and correspondence received by Hero India from governmental authorities. In so holding, I am reminded that the threshold for authentication is low and that documents can be authenticated through circumstantial evidence. Hearsay/Business Records

- [28] I will now address the admissibility of the various documents included within the sub-tabs of document 248 and those referred to in Schedule "A" to the written argument of Mr. Oswald. Sub-tab 2 (Financial Statement)
- [29] Sub-tab 2 is the Financial Statement for Hero India for the year ended March 31, 2015. I am satisfied that this document is admissible as a business record. It is well known that financial statements are prepared by companies as a matter of course and are routinely admitted into evidence as a business record. The testimony of Mr. Oswald and Mr. Mhamunkar both confirmed that Hero India produced such financial statements semi-annually and gave some evidence as to how such statements were produced. Mr. Rinero also gave evidence as to the process involved in the creation of financial statements after his involvement. The lack of personal involvement and knowledge on the part of Mr. Rinero in relation to the preparation of the financial statement is a matter that goes to the weight. Sub-tab 3 (Fixed Assets Write-Down)
- [30] Sub-tab 3 is a collection of documents related to a write-down of the fixed assets of Hero India in the approximate amount of INR 1.4 million. The main document under this sub-tab is a spreadsheet at pages 14-15 entitled "Fixed Asset Registrar (Abstract)". The other documents under this sub-tab are journal entries, a summary of journal entries and a copy of the financial statement of Hero India ending March 31, 2016.
- [31] Mr. Rinero testified that he created the spreadsheet based on information received from Hero India. After creating the spreadsheet, he sent it to Hero India asking them to check the status of the listed assets and to fill out the columns "Check" and "Final Action".
- [32] I am not satisfied that the spreadsheet at pages 14-15 is admissible as a business record or under the principled exception to the hearsay rule. First, although Mr. Rinero testified that fixed assets and inventories are items that he looks at when preparing financial statements, his evidence falls short of establishing that the spreadsheet was prepared in the usual and ordinary course of business. Second, Mr. Rinero has no personal knowledge whatsoever of the various assets listed in the spreadsheet or what became of them. Further, the spreadsheet does not meet the dual criteria of reliability and necessity of the principled exception to the hearsay rule. With respect to reliability, the spreadsheet was prepared, at least in part, for the purpose of this litigation and for the investigation being conducted by Start Up. With respect to necessity, there is no reason that someone from the management team of Hero India could not have been called as a witness to testify as to the checks done of the listed assets and the reasons for the write-offs.
- [33] The journal entries and the summary of the journal entries under sub-tab 3 are, in my view, admissible as business records. Such journal entries are routinely made in the usual and ordinary course of business.

- [34] The March 31, 2016 financial statement of Hero India is also admissible as a business record. Mr. Rinero was involved in preparing this document and, as indicated elsewhere, such documents are routinely admitted as business records. The handwritten annotations on the document are merely to identify the parts of the document that are relevant to this sub-tab. Sub-tab 4 (Inventory Write-Offs)
- [35] Sub-tab 4 is a collection of documents related to a write-down of the inventory of Hero India in the amount of approximately INR 3.48 million. The primary document under this sub-tab is a 49 page inventory listing that apparently compares the inventory records against the "Auditor's Count". Mr. Rinero testified that he received this document from the "finance team" of Hero India and that he reviewed it for the purpose of preparing the March 31, 2016 financial statement.
- [36] The 49 page inventory write-off document suffers from the same defects as the spreadsheet under sub-tab 3. There is no evidence that the inventory count by the "Auditors" was in the usual and ordinary course of business and no evidence the spreadsheet was made in the usual and ordinary course of business. In fact, it seems to be an extraordinary document more connected with the investigation being conducted than with the creation of financial statements. Mr. Rinero has no personal knowledge of the inventory items or the count that was apparently made. Finally, the document suffers from the same issues of reliability and necessity as the spreadsheet under sub-tab 3. Again, there is no reason why the "Auditors" who conducted or supervised the inventory check cannot be called to testify.
- [37] The March 31, 2016 financial statement of Hero India at sub-tab 4 with the handwritten notations is admissible as a business record. Sub-tab 5 (Inventory Calculation 2)
- [38] Sub-tab 5 relates to further inventory write-offs in the approximate amount of approximately INR 10.6 million. The documents under this sub-tab include: a spreadsheet entitled "Detail of Inventory Write-Off" (pages 90-92); a further spreadsheet entitled "Inventory After Write-Off" (pages 93-117); two summary spreadsheets; and a copy of the December 31, 2016 financial statement with handwritten notations.
- [39] The spreadsheets at pages 90-92 and 93-117 are not admissible for the same reasons as given for the inadmissibility of the 49 page document under sub-tab 4. The summary spreadsheets (pages 118-121), being based on the inadmissible ones, are likewise inadmissible.
- [40] The December 31, 2016 financial statement is admissible as a business record. Sub-tab 6 (Loss on Receivables)
- [41] Sub-tab 6 relates to bad debts and uncollectible receivables. The documents under this sub-tab include: a three page spreadsheet entitled "Bad Debt Analysis"; a bad debt calculation; a journal entry; and a copy of the March 31, 2016 financial statement with handwritten notations.

- [42] Mr. Rinero testified that the spreadsheet was originally prepared by him by extracting the information from the SAP system of Hero India. He then sent the spreadsheet to Hero India who filled out the last column indicating the debts that were considered bad. He then used the figure given to him by the Hero India team to calculate what the bad debt provision should be for the March 31, 2016 financial statement. This amount was then used for a journal entry to increase the provision for bad debts and appears in the March 31, 2016 financial statement which he signed.
- [43] In my view, all of the documents at sub-tab 6 are admissible. The documents were all created by Mr. Rinero and were done as part of the process of preparing the March 31, 2016 financial statement. The lack of evidence from someone in India as to why the various receivables were declared as bad debts or what steps were taken to collect them are things that will go to weight. Sub-tab 7 (Loss on Receivables 2)
- [44] The documents at sub-tab 7 relate to a second write-down of accounts receivables recognized in the December 31, 2016 financial statement. The documents under this sub-tab are admissible for the same reasons as the documents were admissible under sub-tab 6 and, again, the lack of evidence as to why the various receivables were written-off is a matter that will go to weight. Sub-tab 8 (Loss on Advances)
- [45] Sub-tab 8 relates to losses on uncollectible advances that had been made to employees and suppliers. There are two main documents under this sub-tab; the first is a spreadsheet of advances made to employees and the second is a spreadsheet of advances made to suppliers. Mr. Rinero testified that the spreadsheets were prepared by someone in the local team and sent to him and used in the preparation of the financial statements.
- [46] In my view, all of the documents at sub-tab 7 are admissible. Although the spreadsheets were not created by Mr. Rinero, they were prepared as part of the process of preparing the March 31, 2016 financial statement and were used by him in preparing the financial statement. The lack of evidence as to why the various advances were declared uncollectible or what steps were taken to collect them are things that will go to weight. Sub-tab 9 (Wrong Assigned Costs)
- [47] Sub-tab 9 consists of journal entries adjusting various taxes and costs and a summary of those journal entries. According to Mr. Rinero, these journal entries were made by someone in Hero India. In my view, these documents are all admissible as business records. Sub-tabs 10 and 11 (Service Tax)
- [48] Sub-tabs 10 and 11 are in relation to service tax adjustments. Sub-tab 10 contains one document only, being a letter dated November 8, 2016 from the Office of the Commissioner of Service Tax to Hero India notifying it of a hearing in relation to a service tax demand of INR 681,499. Sub-tab 11 contains: correspondence dated July 2016 from the Office of the Assistant Commissioner of Service Tax to Hero India alleging that service tax and duty are owed; various journal entries related to service tax; a summary of the journal entries; the financial statement of Hero India for the period ending March 31, 2017 with handwritten

notations; and several bank receipts for service tax payments.

- [49] In my view, all of the documents in sub-tabs 10 and 11 are admissible. The journal entries, summaries of journal entries and the financial statement are all business records. With respect to the correspondence from the governmental authorities, Mr. Rinero gave evidence that the correspondence was sent to him by the local team in India. He specifically testified that the local manager was under instructions to send him such documents as soon as they were received. Such correspondence is admissible under the principled exception to the hearsay rule. It meets the test for threshold reliability on the basis that it emanates from a governmental authority. It meets the test for necessity on the basis that it would not be practical to have governmental authorities testify at trial. The ultimate reliability of the document, or the weight that should ultimately be given to it, is a matter to be addressed in my final reasons. Sub-tabs 12-15 (Sales/VAT Tax)
- [50] Sub-tabs 12 through 15 all relate to sales tax adjustments for various years and contain similar types of documents. The documents are: a summary spreadsheet and a spreadsheet prepared by Deloitte; journal entries and summaries of journal entries; sales tax returns from April 2009 to August 2015 (which are admitted); bank receipts of payment of sales tax; financial statements with handwritten notations; and various notices of tax assessments issued by the appropriate tax authorities.
- [51] In my view, with the exception of the Deloitte spreadsheets, which I address separately, all of the documents under these tabs are admissible as business records or come within the principled exception to the hearsay rule.
- [52] With respect to the Deloitte spreadsheet at pages 226-234 of sub-tab 12, Mr. Rinero testified that this was prepared by Deloitte using information extracted from the SAP system of Hero India. Mr. Rinero reviewed the spreadsheet and added some notes to it. I am satisfied that the spreadsheets, although not prepared by Mr. Rinero, should nevertheless be admitted on the basis that they provide a summary of voluminous source documents which would be impractical for this Court to review. However, the weight, if any, to be given to the spreadsheet will depend, at least in part, on whether and to what extent the source documents have been disclosed to Mr. Oswald and Mr. Mhamunkar. Sub-tabs 16-17 (Income Tax)
- [53] Sub-tabs 16 and 17 relate to income tax demands and assessments by Indian governmental authorities. The documents under these tabs are the demands and assessments of governmental authorities and proofs of payment.
- [54] All of the documents within sub-tabs 16 and 17 are admissible as business records and under the principled exception to the hearsay rule. Again, the ultimate reliability of the demands and assessments, or the weight that should ultimately be given to them, is a matter to be addressed in my final reasons. Sub-tab 18 (Provident Fund)

- [55] Sub-tab 18 contains two pieces of correspondence to Hero India from the Employee Provident Fund Organization dated February 10 and 15, 2016. The February 10, 2016 correspondence seems to say that Hero India owes INR 41 million to the Provident Fund. The correspondence of February 10 adjourns the hearing of the matter to February 24, 2016.
- [56] The correspondence from the Employee Provident Fund Organization is admissible under the principled exception to the hearsay rule for the reasons I outlined earlier in relation to the correspondence of governmental authorities. Again, the ultimate reliability of the demands made by the Employee Provident Fund Organization, or the weight that should ultimately be given to them, is a matter to be addressed in my final reasons. Other Documents
- [57] My rulings with respect to the other documents referred to in Schedule "A" to the written argument of Mr. Oswald are as set out below. TAB DATE DOCUMENT

Ruling

36 31/Dec/2014 Financial Statement (unaudited) re: Hero Products India Private Limited
 Admissible 154 26/Oct/2015 Journal Entry by Hero Products Ltd. PVT. re: Vikas Industries
 Admissible 157 27/Oct/2015 Journal Entry by Hero Products Ltd. PVT. re: Prakash Pumps
 Admissible 165 01/Nov/2015 Journal Entry by Hero Products re: Tanot Contractor Admissible 166
 01/Nov/2015 Journal Entry by Hero Products PVT Ltd. re: Tanot Contractor Admissible 167 03/
 Nov/2015 Journal Entry by Hero Products PVT Ltd. re: Tanot Contractor Admissible 168 05/
 Nov/2015 Journal Entry by Hero Products Ltd. PVT. re: Bholanath Admissible 171 16/Nov/2015
 Journal Entry by Hero Products Ltd. PVT. re: Bolanath Admissible 181 26/Nov/2015 Journal Entry
 by Hero Products Ltd. PVT. re: Bolanath Admissible 186 31/Dec/2015 I.C.T.C. Non-Consolidated
 Financial Statements Year Ended December 31 , 2015 (unaudited) This document has not yet been
 authenticated and until authenticated is not admissible. 192 07/Feb/2016 Inspection Report on
 Laptops Received from Mr. Nevil Oswald and Mr. Narendra Mhamunkar Not Admissible Although
 Mr. Rinero recognized the document, the document is hearsay and not admissible under any
 exception. 194 31/Mar/2016 Journal Entry by Hero Products Ltd. PVT. re: Prakash Pumps
 Admissible 195 31/Mar/2016 Journal Entry by Hero Products Ltd. PVT. re: Vikas Industries
 Admissible 217 31/Dec/2016 Hero Products India Private Limited financial Statements -- financial
 year ending 31 st March 2016 -- signed AND Annexure A to Independent Auditors' Report
 Admissible 233 01/Sep/2017 Letter to Rushabha Patel & Associates This document has not been
 authenticated and until authenticated is not admissible. 234 14/Sep/2017 Email from
 Massimiliano Altabella to Gabriele Rinero re: Service Tax Admissible 235 15/Sep/2017 Email from
 Mangesh Bharambe to Gabriele Rinero re: Service tax -- document with approval from Tax
 Officer Admissible 236 30/Sep/2017 Hero India Balance Sheet, Statement of Profit and Loss, Cash
 Flow Statement and Notes as at March 31, 2016 and March 31, 2017 Admissible Opinion Evidence

- [58] The principles that apply to the admissibility of opinion evidence are not really disputed. The basic principle is that a witness may not give opinion evidence but is limited to testifying only to facts. The inferences to be drawn from those facts are the purview of the trier of fact: *R v. D(D)*, 2000 SCC 43, at para. 49.
- [59] There are exceptions to the rule that opinion evidence is not admissible, namely: properly qualified expert opinion evidence and, in limited circumstances, lay opinion evidence.
Expert Opinion
- [60] The principles applicable to the admission of expert opinion evidence are summarized by the Supreme Court of Canada in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 [White Burgess], at paras. 16-25. First, the Court is to assess, on a threshold basis, whether the proposed expert opinion evidence is: relevant; necessary to assist the trier of fact; not otherwise prohibited by an exclusionary rule; and is given by a properly qualified expert. Second, and only once the threshold requirements are satisfied, the Court performs its gatekeeping function by assessing the benefits or probative value of admitting the evidence against the risks or prejudicial effects: 23 At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four Mohan factors (relevance, necessity, absence of an exclusionary rule and a properly qualified expert) and in addition, in the case of an opinion based on novel or contested science or science used for a novel purpose, the reliability of the underlying science for that purpose: J.-L.J., at paras. 33, 35-36 and 47; *Trochym*, at para. 27; *Lederman, Bryant and Fuerst*, at pp. 788-89 and 800-801. Relevance at this threshold stage refers to logical relevance: *Abbey (ONCA)*, at para. 82; J.-L.J., at para. 47. Evidence that does not meet these threshold requirements should be excluded. Note that I would retain necessity as a threshold requirement: *D.D.*, at para. 57; see *D. M. Paciocco and L. Stuesser, The Law of Evidence* (7th ed. 2015), at pp. 209-10; *R. v. Boswell*, 2011 ONCA 283, 85 C.R. (6th) 290, at para. 13; *R. v. C. (M.)*, 2014 ONCA 611, 13 C.R. (7th) 396, at para. 72. 24 At the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks. The required balancing exercise has been described in various ways. In *Mohan*, Sopinka J. spoke of the "reliability versus effect factor" (p. 21), while in J.-L.J., Binnie J. spoke about "relevance, reliability and necessity" being "measured against the counterweights of consumption of time, prejudice and confusion": para 47. *Doherty J.A.* summed it up well in *Abbey*, stating that the "trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence": para. 76.
- [61] *White Burgess* further clarifies, at para. 45, that the independence and impartiality of an expert is a threshold requirement to the admissibility of the expert's opinion evidence. At para. 49, the Court addresses various scenarios where the threshold is not met. Importantly, although the Court recognized that a mere employment relationship between the expert and

the party calling the evidence will not be sufficient to establish lack of independence, the threshold requirement will not be met where the expert assumes the role of an advocate: 49 This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court. For example, it is the nature and extent of the interest or connection with the litigation or a party thereto which matters, not the mere fact of the interest or connection; the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible. In most cases, a mere employment relationship with the party calling the evidence will be insufficient to do so. On the other hand, a direct financial interest in the outcome of the litigation will be of more concern. The same can be said in the case of a very close familial relationship with one of the parties or situations in which the proposed expert will probably incur professional liability if his or her opinion is not accepted by the court. Similarly, an expert who, in his or her proposed evidence or otherwise, assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court. I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence. [Emphasis added.]

- [62] I have emphasized those portions of the above quotation because, in my view, they apply to the evidence of Mr. Rinero. He is not merely an employee of Start Up. Rather, and as he admitted during his cross-examination, he is the representative for Start Up in this litigation. He has assumed the role of an advocate for Start Up. His evidence is not independent, impartial or unbiased and would not meet the threshold requirements for admission as expert evidence, if it was proffered as expert evidence.
- [63] However, Start Up does not seek to qualify Mr. Rinero as an expert and does not argue that his evidence should be admissible as expert evidence opinion evidence. Rather, Start Up submits that his evidence is admissible as lay opinion evidence on the basis that it is either a "compendious statement of facts" or a "demonstrative aid". Lay Opinion
- [64] The principles applicable to the admissibility of lay opinion evidence are summarized in *Ganges Kangro Properties Ltd. v. Shepard*, 2015 BCCA 522, at paras. 69-76, and the relevant requirements are set out as follows:
- [73] In *The Law of Evidence in Canada*, 4th ed. (Markham, Ont.: LexisNexis Canada Inc., 2014) at 774, Bryant, Lederman & Fuerst summarize the factors relevant to the compendious statement of facts exception as follows: Courts now have greater freedom to receive lay witnesses' opinions if: (1) the witness has personal knowledge of observed facts; (2) the witness is in a better position than the trier of fact to draw the inference; (3) the witness has

the necessary experiential capacity to draw the inference, that is, form the opinion; and (4) the opinion is a compendious mode of speaking and the witness could not as accurately, adequately and with reasonable facility describe the facts she or he is testifying about.

- [65] Lay opinion evidence may only be given where the matter does not require scientific, technical or specialized knowledge: *Stolba v. Comwave*, 2019 BCCA 120, at para. 41; and *American Creek Resources Ltd. v. Teuton Resources Corp.*, 2015 BCCA 170, at paras. 38-39.
- [66] I fail to see how the evidence of Mr. Rinero can be characterized as "a compendious statement of facts". He is making no inferences from personally observed facts. Rather, the purpose of his evidence, and tab 1 of document 248, is to provide valuations for Hero India, the Hero Group and the individual shares in the Hero Group. The valuation of a subsidiary company, the contribution of that company to the value of its parent, and the worth of the shares of the parent company are, in my view, all matters of opinion that require specialized knowledge and expertise. There are different methods of valuing companies and shares and expertise is required to know what method is appropriate. Expertise is also required for the selection of the data to be used in the calculations.
- [67] It is noteworthy that during his cross-examination, Mr Rinero acknowledged that there are different ways of valuing a company or the shares in a company and that some business evaluators might dispute the method that he chose to use. It is further noteworthy that he acknowledged his calculations used an amount owing to the Provident Fund that was significantly higher than the amount that was ordered to be paid on April 30, 2019 (Document 245). He used an amount of INR 41,171,914 when the April 30, 2019 order had apparently revised the amount downward to INR 2,065,833. I point this out merely as an example of the need for a proper qualified expert to select the appropriate data to use in the calculations. Demonstrative Aid
- [68] Start Up further submits that Mr. Rinero's evidence and his calculations at tab 1 of document 248 are admissible as a demonstrative aid. It relies upon *R. v. Ajise*, 2018 ONCA 494, *aff'd* on other grounds 2018 SCC 51; *R. v. Agyei*, 2007 ONCJ 459; and *Kon Construction*.
- [69] In *Ajise*, the issue was whether the evidence of a CCRA investigator, who was not qualified as an expert, amounted to opinion evidence. The investigator had prepared a spreadsheet that was used to calculate false donation claims and the taxes avoided by the accused. The Ontario Court of Appeal held that the spreadsheet was properly admissible and that the evidence did not constitute opinion evidence:
- [23] First, Maraj is properly characterized by the Crown as a fact witness, called to explain how she had assembled and summarized a large volume of documentary evidence relating to the income tax returns filed by the appellant. It was only at the end of her evidence in chief, when Exhibit 12 was introduced, that she was asked to explain why she believed all the charitable claims filed by the appellant's clients were false. When asked that question, she simply explained what the records showed. Maraj was doing nothing more than explaining her sources and her methodology in a way that would allow the jury to understand and to

assess the numbers on Exhibit 12. The lists from Eto's computer, the list on the appellant's computer, and the compilation derived from the cancelled cheques demonstrated that a very large number of the appellant's clients had submitted substantial claims for charitable donations to Tractors representing a disproportionate part of their income. The records showed that the appellant had been directly paid 10 to 15% of the amounts claimed by way of donation and that Tractors had reported receipt of virtually no charitable donations. While the total of the itemized, client by client lists of Tractors donations was less than the total showed by C.C.R.A. records for all returns filed by the appellant, Maraj testified that they were close enough to lead her to believe that all the charitable claims the appellant filed were false, which is why she included them in the "false donation" column on Exhibit 12. While it might have been preferable had Maraj not been asked to formulate her summary of the evidence she found in terms of her belief, and had the trial judge not referred to her opinion in his instructions, it remains that Maraj's evidence was essentially factual in nature. It was entirely proper for her to explain to the jury the nature of the calculations she had made and the source data she used to compile Exhibit 12, which was an admissible demonstrative aid designed to summarize the properly admitted evidence and "to assist the jury in understanding the entire picture presented by voluminous documentary evidence": *R v. Scheel* (1979), 1978 CanLII 2414 (ON CA), 42 C.C.C. (2d) 31, at p. 34 (Ont. C.A.); *Kon Construction Ltd. v. Terranova Developments Ltd.*, 2015 ABCA 249, 20 Alta L.R. (6th) 85, at para. 46. As with the summaries in *Scheel*, the usefulness of Exhibit 12 "depended entirely upon the acceptance by the jury of the proof of the facts upon which [it was] based": *Scheel*, at p. 34. The jury was in a position to assess for itself the worth of Maraj's explanation for her calculations as they did not rest on or draw its force from any specialized or technical skill or knowledge: see *R. v. Hamilton*, 2011 ONCA 399, 271 C.C.C. (3d) 208, at para. 277. [Emphasis added]

- [70] Similarly, in *Agyei*, a spreadsheet containing a summary of records was admitted on the grounds that it would be inconvenient to require production and admission of the voluminous original records:
- [24] Ms. Neumann explained in her testimony that the spreadsheet is a summary of Citigroup's source records as reviewed by Ms. Neumann. Ms. Neumann testified that while she did not create the source records personally, she did verify the information contained within the source records and was satisfied that it was accurate. She also testified that Citigroup kept the records in an electronic system that is maintained for banking records.
- [25] I adopt the position and analysis of Justice Martin in the case of *R. v. Scheel* 1978 CanLII 2414 (ON CA), [1978] O.J. No. 888 at 18 (C.A.)
- [26] Summary evidence of this type is admissible for practical reasons associated with tendering multiple documents at trial and to allow for the convenience of trials. In *R. v. Scheel*, Justice Martin cites an excerpt from Wigmore's text for the exception to requiring production of primary source documents when a summary is tendered: Where a fact could be ascertained only by the inspection of a large number of documents made up of very numerous detailed

statements - as, the net balance resulting from a year's vouchers of a treasurer or a year's accounts in a bank ledger, -- it is obvious that it would be practically out of the question to apply the present principle by requiring the production of the entire mass of documents and entries to be perused by the jury or read aloud to them. The convenience of trials demands that other evidence be allowed to be offered, in the shape of the testimony of a competent witness who has perused the entire mass and will state summarily the net result. Such a practice is well established to be proper. Wigmore on Evidence, 4th ed. Vol. IV at p. 535 [Emphasis added.]

- [71] In *Kon Construction*, the Alberta Court of Appeal considered the admissibility of electronic records of survey data and whether such records required an expert witness to testify. The Court noted that some computer records and programs are sufficiently "idiosyncratic, sophisticated and judgmental" that expert evidence is required: at para. 22. However, other programs, such as Excel, are so common that the results generated by such programs are not opinion evidence and do not require introduction by an expert with "specialized knowledge":
- [23] An example of a software program that does not usually rise to the level of "opinion", for the purposes of the law of evidence, is the commonly used data spreadsheet program Microsoft Excel. That program is specifically designed to record raw data in rows and columns. The program can then be told to automatically organize (alphabetically, by date, etc.) and process that data (add, subtract, multiply, divide, etc.). It can also be told to isolate out data by characteristics (by date, amount, or other ascribed characteristic). The ordinary use of arithmetic formulas, and sorting of data by type, does not require "specialized knowledge"; just because a computer can do it faster does not change its categorization as evidence. Many people use Microsoft Excel, but few could actually describe how it works or what it is doing to the data. Few users could actually explain why the data are reliable, yet the results it produces are routinely relied on. That is because the program has been designed, tested, and used so repeatedly that it has been shown to be inherently reliable. The results from such a program are not "opinion evidence", and they do not require introduction by an expert: *R. v George* (1993), 146 AR 107 at para. 34, 14 Alta LR (3d) 106 (PC).
- [72] I accept *Ajise*, *Agyei* and *Kon Construction* as authority for the proposition that a spreadsheet summarizing data that is otherwise properly before the Court can be properly admitted into evidence. I further accept them as authority for the proposition that a spreadsheet containing simple calculations can be admitted without having the witness being qualified as an expert. However, the spreadsheet at tab 1 of document 248 and Mr. Rinero's testimony is not simply a summary of otherwise admissible evidence nor is it a simple calculation. The ultimate purpose of tab 1 and of Mr. Rinero's testimony in relation thereto is to value the shares in the Hero Group. As I have indicated, such a valuation requires, at a minimum, determination of the appropriate methodology and selection of the appropriate data. These determinations require specialized expertise that Mr. Rinero does not have. If Mr. Rinero had confined himself to simple calculations, there would be nothing

objectionable in tab 1 provided it summarized evidence that was otherwise properly before the Court. He did not so confine his evidence. He expresses an opinion on the value of the shares, something which goes beyond collating or summarizing otherwise admissible evidence. Opinions from Litigants with Expertise

- [73] Start Up finally submits that tab 1 of document 248 and the testimony of Mr. Rinero is admissible as the opinion of a litigant with expertise. In support of this submission it again relies on Kon Construction where the Alberta Court of Appeal noted that there were three categories of "witnesses with expertise"; the traditional independent experts who were not involved in the underlying events, witnesses with expertise who were involved in the underlying events but are not litigants, and, finally, litigants who have expertise:
- [34] The witnesses Marinus Scheffer and Hans Klaver fall in a gray area. They are "expert witnesses" in the sense that they have expertise: Scheffer is a professional engineer and Klaver is a surveyor. They were only involved in original work and this litigation because of their expertise. The respondent Scheffer Andrew was sued on the basis that it failed to properly apply Marinus Scheffer's and Klaver's expertise in administering the earthworks contract. They were not however "expert witnesses", in the sense that they were neither qualified by the trial judge as being capable of providing opinion evidence, nor did they provide advance notice of any expert opinions they were going to give. They were witnesses because they were involved in the very events that gave rise to the litigation, not because they had been hired as "expert witnesses" to provide objective, external evidence to assist the Court.
- [35] Thus, there would appear to be at least three categories of "witnesses with expertise", who in some respects are witnesses of fact, and in other respects opinion witnesses:
- (a) Independent experts who are retained to provide opinions about issues in the litigation, but were not otherwise involved in the underlying events. This is the category of expert witness contemplated by White Burgess and Mohan.
 - (b) Witnesses with expertise who were involved in the events underlying the litigation, but are not themselves litigants. An example is the family physician in a personal injury case who is called upon to testify about his or her observations of the plaintiff, and the treatment provided.
 - (c) Litigants (including the officers and employees of corporate litigants) who have expertise, and who were actually involved in the events underlying the litigation. Marinus Scheffer and Klaver fall into this category. ... [Emphasis Added]
- [74] With respect to the final category, witness-litigants with expertise, the Court noted that such witnesses are not disqualified from giving evidence by reason of their interest in the outcome:

- [38] The final category of litigant-witnesses with expertise does not fall neatly into the White Burgess and Mohan analysis. First of all, it is unnecessary to prove that such a witness is "impartial, independent, and unbiased" as discussed in White Burgess. Litigants are no longer disqualified as witnesses because of their obvious interest in the case.
- [75] The Court further noted that witness-litigants are entitled to testify and to stray into their expertise and provide opinions when testifying:
- [40] Secondly, it is generally not necessary to qualify the last class of witnesses with expertise as "experts" under the Mohan procedure. As parties to the litigation they are entitled to testify, and generally they will have the most direct and relevant evidence about the issues. The truth finding function of a trial requires that their evidence be received. Since they were often only involved in the underlying events because of their expertise, it makes no sense to hold that they cannot explain why they acted as they did, if they stray into their expertise. Their opinions explain why they acted as they did. Since these witnesses are available for pre-trial questioning, formal advance notice of their opinions or their evidence is not needed.
- [76] To the extent that Kon Construction recognizes a new exception to the rule against opinion evidence, in my view it does not assist Start Up. First, the exception applies only to litigants "who were actually involved in the events underlying the litigation". First, Mr. Rinero was not actually involved in the events underlying the litigation. He joined the Hero Group as Chief Financial Officer in September of 2015. By this time Mr. Oswald had already ceased to be Managing Director of Hero India. Mr. Mhamunkar also ceased to be a director in November 2015. Second, the opinion evidence of Mr. Rinero that is sought to be tendered is not of the type referenced in Kon Construction. Start Up does not seek to tender Mr. Rinero's opinions as a means of explaining why he acted the way he did. Mr. Rinero's actions are simply not in issue in the litigation. Start Up tenders his evidence as proof of the value of the shares, which Mr. Rinero does not have the expertise to do.
- [77] Accordingly, tab 1 of document 248 and Mr. Rinero's viva voce testimony concerning his opinions as to the value of the shares of Hero Group are inadmissible. "Giaschi J."

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